



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04501/2017  
HU/04505/2017  
HU/04506/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 2 August 2018

Decision & Reasons Promulgated  
On 24 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER, NEW DELHI

and

Appellant

AISHOVA RAI  
MOHANRAJ RAI  
BIMALA RAI

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr J Khalid, counsel.  
For the Respondent: Ms A Everett, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer, New Delhi against a decision of the First-tier Tribunal issued on 19 March 2018 allowing appeals by the applicants against the respondent's decision of 3 December 2017 refusing them entry clearance as the dependent children of their widowed mother who had been married to a former Ghurka soldier. In this decision I will refer to the parties as they were before the First-tier Tribunal, the Entry Clearance Officer as the respondent and the applicants as the appellants.

## Background

2. The appellants are citizens of Nepal. They are siblings born on 30 November 1992, 11 September 1996 and 29 November 1993 respectively. In brief outline, the background to this appeal is as follows. Their father was a Ghurka soldier who served in the British Army for almost 11 years, retiring on 8 June 1970. He died in Nepal on 3 July 2003. He and his wife had four children, the three appellants and their younger sibling born on 13 February 2003.
3. In 2017 their mother, the sponsor, and all four children applied to settle in the UK. The sponsor was granted entry clearance on 3 February 2017 under the provisions set out in IDI Ch 15 section 2A, Annex B, a discretionary arrangement applicable only to widows of former Ghurka soldiers. The discretion does not apply to children who, accordingly, must meet the requirements of the Immigration Rules. The younger daughter did meet those requirements and was granted entry clearance to settle with her mother.
4. The three appellants were adults at the time of application and they were unable to meet the provisions of the Rules under appendix FM. The respondent found that they could not meet the requirements of Annex K of IDI Ch 15 section 2A and further that the refusal of entry clearance would not amount to a disproportionate interference with their private and family life with their mother and sister. Their applications were refused.

## The Hearing before the First-tier Tribunal

5. The judge found that the appellants had lived as a close family with their mother and younger sister in Nepal. They were and remained unmarried and there was evidence that the appellants were unemployed [20]. The judge clearly had some doubts about the full financial arrangements, saying at [24] that he was not satisfied that the sponsor had fully or openly accounted for what her children had been doing since they reached their majority but, nonetheless, he was not satisfied from the evidence that they had become independent from the family unit existing at the date of application. He found that they were dependent on the family income, whether derived from the sponsor's pension and surplus income only or from employment that one or more of them had as he was satisfied that such income was likely to have been pooled together.
6. He found that there was sufficient evidence in the form of money transfers to show that the sponsor continued to send money to Nepal to support her children and evidence to show that withdrawals were made there from her pension consistent with her account that the appellants relied on this money for their maintenance.
7. The judge was satisfied that family life existed between the three appellants and their mother and sister at the date of application and that they were not independent of their mother and were part of her household culturally, emotionally, financially and dependently [27]. He commented that the appellants were fit and healthy young

adults and that the first appellant at least had the capacity to find employment and become independent of the family unit but he was satisfied that they were currently financially dependent on their sponsor in the UK [29].

8. The judge also found that but for the historic injustice involving former Ghurka soldiers, the appellant's father would have applied for settlement in the UK upon his retirement from military service and, consequently, that the appellants would most likely have been born in the UK. He further commented at [35] that having considered the decision in Rai v ECO, New Delhi [2017] EWCA Civ 320, it further satisfied him that on the facts of this case that the appellants were part of a subsisting family and would have settled in the UK as part of that family had their applications not been refused [35]
9. He commented at [36] that the respondent had not identified any particular feature as part of the case against the appellants save the public interest in the operation of firm and fair immigration control. There was no suggestion that the appellants posed either together or individually any risk of harm or offending to the general population. It was proportionate to permit the appellants who formed and continued to form family life with their mother and sister to join their family. This was a case where the respondent's reasons for refusal were based on public interest in immigration control and that assessment had to be resolved in the appellant's favour. Accordingly, the appeals were allowed.

### The Grounds and Submissions

10. The grounds argue that the judge was wrong to say that but for the historic injustice, the sponsor's husband would have applied for settlement on retirement from military service. If he had been able to and had done so, the factual matrix of the case would collapse. He had retired in 1970 at a time with the sponsor was three years old. If he had come to the UK in 1970, he would not have married the sponsor and none of the children would have been born. Therefore, so it is argued, the historic injustice argument did not apply to circumstances in 1970. It is argued that there was no indication that the appellant's father had expressed any interest in settlement in the UK up to his death in 2003.
11. The grounds also argue that the Tribunal misdirected itself by applying both Ghising v ECO [2013] (Ghurkas/BOCs; historic injustice; weight) UKUT 567 and Rai so rigorously. When the appeal was considered outside the Rules it should have been considered as an article 8 case outside the Rules rather than as a Ghurka case outside the Rules. It is argued that it appeared that the family did not consider the possibility of settlement in the UK until a decade after the death of the sponsor's husband. The Tribunal had found that the evidence provided by the sponsor and the appellants was not comprehensive and it would therefore appear that the evidence relied on was selective and not reliable. Finally, it is submitted that the Tribunal's approach to the proportionality assessment was shaped entirely by the historic injustice argument and the judge had not considered the appellants' ability to be financially independent and,

in any event, it was not clear from the findings how the sponsor and her child were able to maintain themselves or whether they relied on public funds.

12. Ms Everett relied on the grounds. She submitted that the Tribunal had erred in coming to speculative conclusions and had failed to take into account the current Rules and policies when considering article 8 and, in particular, proportionality.
13. Mr Khalid submitted that the judge had approached the appeal correctly and reached findings properly open to him. He had been entitled to consider the issue of the historic injustice and had taken all relevant factors into account.

#### Assessment of the issues

14. The issue I must consider is whether the judge erred in law such that the decision should be set aside. There has been no challenge to his finding that family life was engaged within article 8(1). The challenge in substance is to whether and to what extent the judge was entitled to take account of the historic injustice and whether he should have considered what would have happened, had the appellant's father been able to come to the UK after retiring from military service. Further, it is argued that the assessment under article 8 should have been made in the context of an assessment of article 8 outside the Rules rather than simply an assessment in the context of an application for settlement by children of a former Ghurka.
15. How the issue of the historic injustice should be assessed was considered by the Upper Tribunal in Ghising v ECO as follows:

59. That said, we accept Mr Jacobs' submission that where Article 8 is held to be engaged and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this will ordinarily determine the outcome of the proportionality assessment; and determine it in an Appellant's favour. The explanation for this is to be found, not in any concept of new or additional "burdens" but, rather, in the *weight* to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. What was crucial, the Court said, was the consequence of the historic injustice, which was that Ghurkas and BOCs:

"were prevented from settling in the U.K. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Ghurka who is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in maintaining of a firm immigration policy". [41]

In other words, the historic injustice issue will carry significant weight, on the Appellant's side of the balance, and is likely to outweigh the matters relied on by the Respondent, where these consist solely of the public interest just described.

60. Once this point is grasped, it can immediately be appreciated that there may be cases where Appellants in Ghurka cases will not succeed, even though their family life engages Article 8(1) and the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here on completion of his military service. If the Respondent can point to matters over and above the “public interest in maintaining of a firm immigration policy”, which argue in favour of removal or the refusal of leave to enter, these must be given appropriate weight in the balance in the Respondent’s favour. Thus, a bad immigration history and/or criminal behaviour *may* still be sufficient to outweigh the powerful factors bearing on the Appellant’s side. Being an adult child of a UK settled Ghurka ex-serviceman is, therefore, not a “trump card”, in the sense that not every application by such a person will inevitably succeed. But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant’s favour.

16. I am not satisfied that the judge was wrong to consider the issue of the historic injustice or that he should have considered what might have happened, had appellant’s father come to the UK in 1970 at a time when he had not married the sponsor and the children had not been born. The issue of proportionality cannot be assessed on the basis of what might have happened in different circumstances but in the light of the facts and circumstances at the date of assessment. The fact remains that the appellant’s father did marry and have four children and they lived in Nepal up to and beyond their father’s death in 2003. It also remains the fact that it was not open to the appellants’ father nor his wife or children to apply for settlement until the historic wrong had been identified and remedied by changes in the respondent’s Rules and policies.
17. It was then for the judge to consider what weight should be attached to the historic injustice. It is clear from Ghising that in the absence of any countervailing factors it is to be given substantial weight when considering the public interest in the operation of firm and fair immigration control. The judge was right to comment that the historic injustice was a matter of particular significance in circumstances where no other factors apart from effective immigration control were raised by the respondent as he found to be the case in the present appeal.
18. He was therefore entitled to give considerable weight to the historic injustice. His finding at [31] that the appellants’ father would have applied for settlement was a finding of fact that it was open to him to make and adds to the strength of the historic injustice. When assessing proportionality, he had to take all relevant factors into account including the circumstances in which the application was made and the respective positions of the family members in the UK and in Nepal.
19. I am not satisfied that the judge misdirected himself in his approach to article 8. It was the historic injustice which provided the circumstances which could properly be regarded as exceptional and compelling. There is no substance in the argument that the judge did not take into account the appellants’ ability to be financially independent. He clearly did so, finding at [29] that at least the first appellant had the

capacity to find employment but, nonetheless, the appellants remained financially dependent on their mother. There is also no substance in the argument raising the issue of the sponsor's ability to maintain herself.

20. In summary, I am not satisfied that the judge erred in law. He reached a decision on proportionality properly open to him for the reasons he gave.

Decision

21. The First-tier Tribunal did not err in law and it follows that its decision stands.

Signed: H J E Latter

Dated: 13 August 2018

Deputy Upper Tribunal Judge Latter